In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
KLEINWORT SONS & CO., CLAIMANTS of the cargo of the Spanish bark *Carlos F. Roses.* } No. 243.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

ADDITIONAL BRIEF FOR THE UNITED STATES AND THE CAPTORS.

A.—*The form and character of the further proof.*

The further proof consists of mere *ex parte* affidavits of the manager of the claimant firm (Record, pp. 17, 30, 35). Appended to them are the bills of exchange, the bills of lading—originals and copies or duplicates—and the invoices, shown on pages following those cited. The affidavits state only the facts which show a *prima facie*

claim and are favorable to the claimants, and do not refer to the relations, transactions, or correspondence which must be presumed to have existed and passed between the claimants and the ultimate enemy owners of the cargo. In other words, they amount simply to the assertion that the bills of lading were indorsed over to the claimants in consideration of their acceptance of the bills of exchange, and as security for the liability thereon, with the intent and result of entitling the claimants to the bills of lading and to the cargo described therein. But a submission of all the circumstances involved would have enabled the court to distinguish and settle the real facts and resulting interests and titles according to the legal rights shown to exist. There must have been pertinent facts affecting, for instance, the previous connection between the enemy vessel owner, Valenti (who was also interested in the cargo, if not sole owner thereof), and showing the basis in credits or responsibility, of his dealings with the claimants. To say this is not necessarily to impugn the good faith or *bona fides* of the claimants, but to point out that the essence of their proof is sparse and bare. As to the form thereof, it is true that in the letter of Sir William Scott and Sir John Nicoll to Mr. Jay (Upton's Maritime Warfare and Prize, p. 471), it is stated in accordance with what seems to have been a common practice at an early day, rather than later or now, that "further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction;" in corroboration

of which affidavits, correspondence, invoices, etc., may be annexed. But the letter also states that in cases of suspicion and importance the court may order "plea and proof" instead of admitting affidavits and documents introduced by the claimants only, under which it appears witnesses were examined upon interrogatories or their depositions taken in writing under a commission issued for that purpose; although "this solemn method is not often resorted to."

Justice Story's statement is that "where further proof is ordered, affidavits taken in foreign countries before notaries public, whose attestations are properly verified, are in general proper evidence; but in the Supreme Court of the United States it is by rule of the court required that all such evidence shall be taken under a commission from the court;" citing *The London Packet*, 2 Wheat., 371. (Story's Principles and Practice of Prize Courts, pp. 23, 58; Rule 12 of the Supreme Court.) This rule was adopted at February term, 1817, with special reference to prize, as shown by the case of *The London Packet, supra*. The report shows that counsel for the claimant "offered to read affidavits as further proof which had not been taken under a commission, but they were rejected by the court. The cause was continued to the next term and the further proof ordered to be taken under a commission according to the rule of court of the present term." The rule was originally adopted at February term, 1817, and appears on the unnumbered page next preceding page 1 of the second volume of Wheaton's Reports (Brightly's notes).

The case of *The Frances* (8 Cr., 348) recognized affidavits produced on the order for further proof, although perhaps doubtfully, because they were "too positive to be disregarded without considerable reluctance and hesitation." This case also shows that the court expects full proof and the best proof of all the circumstances, and regards an unexplained omission in this respect as leading to condemnation.

Here, while the affidavit does not refer to letters which are not produced, nevertheless it might have brought forward the negotiations and instructions which must naturally have passed between Valenti, Pages, the neutral shippers, and the London bankers, and, we contend, should have done so.

In *The Magnus* (1 Rob., 31) further proof was required to be by plea and proof, but the court says that if it had been ordered only in general terms, a mere test affidavit and bare attestations would not have been satisfactory. "The correspondence of the parties, the orders for purchase, and the mode of payment would have been the points to which the court would have looked for satisfaction." The form of proof offered, whether by mere affidavit or by some form of argumentative pleading not amounting to proper further proof, is stated by the court to be "less than ordinary proof." Therefore the court declined to allow a second order for further proof to the claimant. "And where such further proof is admissible, it should, in general, be open to both parties, and always be by depositions and written evidence." (Story, circuit justice, in *The George*, 2 Gall., 249.)

In *The Adriana* (1 Rob., 313), further proof on behalf

of the claimants having been brought in, it was attempted to introduce affidavits on the part of the captors to contradict it, on a suggestion that further proof opened the case to both parties. Sir William Scott said:

> With respect to plea and proof this is true; but I do not know that in proof by affidavits this court or the lords of appeal have ever laid down such a rule. I understand the rule to be that further proof by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the court. It is a proper control over the rash or light manner with which the claimants may attempt to pick up something like proof by affidavit; but it is not to be exercised except on special grounds and only with the leave of the court.

On the other hand, the case of *The Harmony* (2 Rob., 322) was argued on production of further affidavits at several times, but these affidavits were connected and circumstantial accounts of all the transactions bearing upon the question at issue, namely, the national character of one of the claimants, so that the court was able to examine and analyze (as we submit the court should be in a position to do in the case at bar) all the transactions and circumstances entering into a settlement of the question.

In *The Sally* (1 Gall., 401), Justice Story on circuit admitted the captors' affidavits as a showing in contradiction of testimony of the claimants upon plea and proof, which he found to be wholly unsatisfactory to prove the innocence of the claimants. He considers the English cases, which appear to hold that where captors are admitted to give evidence on further proof their affidavits are inadmissible, and on the whole finds that there

is not sufficient authority to preclude the court from receiving captors' affidavits in cases of further proof where any evidence on their part is admissible, especially where, as in the case before him, suspicion attached to the original transaction. The learned justice uses the following language regarding the proper source of affidavits:

> In all cases where it is practicable it is the duty of the owners to claim in person, or at least to annex their own affidavits to the special facts stated in support of the claim. There is great danger from a different course. It leads to the substitution of the oaths of mere uninformed agents, who can in general testify only to their belief, instead of the oaths of the parties who are conversant with the facts and have the most weighty responsibility attached to their conduct.

Judge Sprague in *The Amy Warwick* (2 Spr., 150) was of opinion that a detailed statement supported by affidavits was required of any party who asked leave to offer new and independent proof, but that the rule did not apply to a party who only sought to meet with counter-proof to the same points the evidence introduced by an opponent. The question having arisen whether proof should be by affidavits or in the form of depositions, with references to English and American cases as allowing affidavits in cases of what is technically called further proof as distinguished from plea and proof, the court determined that without deciding that affidavits were inadmissible in cases of further proof, he should order the proofs in that case, as more satisfactory, to be taken by a commission on interrogatories and cross-interrogatories.

B.—*Generally as to title by transfer of bills of lading and as to the security thereby pledged.*

On May 31, 1898, a specially authorized agent of the claimants deposed to the facts upon information and belief, and states that the merchandise was shipped by neutrals of the Argentine Republic to be transported to Havana, there to be delivered to shippers' order according to the tenor of the bills of lading; that upon and after the shipment the claimants, long prior to the capture, made their advances upon the security of the cargo, and that thereupon the bills of lading were delivered to them duly indorsed in blank, with the intent that they should take title, and should upon the arrival of the vessel at its destination take delivery and hold the same as security until the advances were paid. The claimants then obtained, on June 2, 1898, their order for further proof, which was successively extended to August 31 and to October 15.

When the three affidavits of the claimants' manager came in, the last one on November 7, 1898, they really showed no additional facts, the plainly intended inference from all the evidence offered being that the neutral shippers were also the owners, or at least possessed a *prima facie* title to the property. The allegation is made in Hareke's affidavit that the cargo was ultimately destined for Don Pedro Pages, of Havana, but there is nothing to indicate that the consignment to him on order might not have been for account of the neutral shippers. The course of events as to indorsement, delivery, acceptance, and pay-

ment of the bills of lading and the bills of exchange, respectively, so far as these appear, is as follows:

On March 14 or 15, 1898, the shipment was made and the voyage began, and the two bills were drawn upon the bankers, one to the order of a London bank having a branch house in the Argentine Republic, and the other to the order of the shippers; the first, for part of the beef and the garlic, being signed by the shippers, and the second, for the balance of the beef, by the master of the vessel. Both bills were accepted on April 6, and on May 9 were paid to the London bank in question. The capture occurred on May 17. The allegation is that the claimants are wholly unindemnified, except by the proceeds of the cargo and the insurance thereon, by which the insurers are subrogated to their own rights. The bills of lading for part of the beef and the garlic were, on April 9, sent by the claimants to their Havana agents, who were advised of the acceptance of the relative draft, and "would, in the ordinary course, hold the said documents until payment had been made by the consignee of the said goods." The bills of lading for the balance of the beef were retained by the bankers pending the disposal of the cargo. In June these agents, in reply to instructions to return the documents inclosed to them, cabled that they had not been received. In September, 1898, the original bills sent by the Havana agents turned up, but without any information as to how the bills came into their possession; and in October, 1898, copies or duplicates of these same bills were also received by the claimants from the agents without explanation. All the original bills of lading are

signed by the master; copies or duplicates are signed or attested by the shippers. The Spanish consul at Montevideo viséd the manifest, showing a shipment by Pla, Gibernau & Co., the Argentine neutrals, "as good for Havana, with a cargo of jerked beef and garlic 'to order,'" but not naming the consignee. But the invoices which came in with the bills show the real ownership and interest in the shipment. (Translation of documents, pp. 38–42.)

Thus it is seen that no facts as to the negotiations or correspondence which must have entered into the transaction are given, and no explanation whatever of these important features in the case. Indeed, the *suppressio veri* is striking throughout.

From *The Soglasie* (Spinks Prize Cases, 104) it is evident that the right demand and effort of the prize court is to be informed of all the facts, and especially of the correspondence and transactions preceding, accompanying, or following the essential fact or occurrence upon which the claim rests.

> But, on the other hand, when such means of information, which might naturally be expected, are wanting, and further proof has been allowed, the court is led to suppose that that which is almost indispensable to a just cause, either does not exist, or, if produced, would be detrimental to the cause of the producent (p. 107).

Here the questions are: Who are the real owners? Who were, as a matter of fact, interested in this cargo and shipment? The claim simply alleges a neutral right which the Government contends is a mere cover to an enemy interest.

The tributary questions are: Did the insurance contemplate a war risk? Why were the bills of lading for the larger portion of the beef retained by the claimants and not sent on to their Havana agents with the other bills, for the same reason and the same purpose? Were they as a matter of fact retained by them on instructions from the enemy owner, or were they possibly sent to him in Spain, and does roundabout correspondence between the latter, his Havana representative, and the claimants and their Havana representative explain the delay in the recovery and submission of the documents?

As remarked, the claim implied that Pedro Pages, of Havana, as consignee, was the agent of the shippers. Nothing is said of his interest for himself or in a representative capacity, and nothing is said of Señor Valenti, the owner of the enemy vessel resident in Barcelona, and, as we contend, the owner of the cargo or of the larger portion. The invoices on pages 40 and 41 show that the real ownership of all the merchandise, except part of the garlic, rested in "the expedition or voyage of the '*Carlos F. Roses*'" and in "Mr. Pedro Pages' of Havana." Could there be clearer evidence of enemy interest, or could stronger reason be imagined than thus appears on the face of the documents for the asserted neutral owners to prove beyond question their right and title? The effect of this evidence against them, like the solemnity of further proof on "plea and proof" (which should have been resorted to here), was surely an awakening thing and should have moved the claimants to establish their right fully, affirmatively, and beyond doubt. (*The Magnus*, 1 Rob., 31, 33.)

> I can not help thinking there is an appearance of something like industry or *astutia* used to withdraw from the court circumstances of which it ought to be apprised. * * * I think it is a case that obliges the court to look with some suspicion—I do not say to employ anything of *astutia* in opposition to the *astutia* employed against it (for *astutia* does not belong to a court of justice), but to exercise its vigilance; and I think I violate no duty in coming to the inquiry with a certain degree of jealousy, which the appearances of the case and the general conduct of the parties have contributed to raise. (*The Rosalie and Betty*, 2 Rob., 343, 346, 347.)

Nevertheless the court below was of opinion that satisfactory proof had been given; that the title and right of possession to the property was in a neutral at the time of capture, because the property was consigned to the order of the neutral shippers, and bills were drawn upon the claimants and were sent to the claimants' Havana agent for the purpose of collecting the amount of the advances on the cargo upon its arrival. The opinion does not notice that the bills for part of the cargo did not go to Havana, but were retained by the claimants, nor that claimants did not assert that the bills were forwarded for the purpose of making a collection. The statement of the affidavit is that the claimants' Havana agents were advised of the acceptance of only one of the drafts, and that "they would in the ordinary course hold the said documents until payment," etc. This transaction was out of the "ordinary course." The bills may have been sent and, we claim were, merely to facilitate delivery to the consignee, the agent of the enemy owner, or agent, possibly, of the local Spanish authorities. What light

has been given by the claimants as to the relations between them and Señor Valenti?—possibly long continuing relations, and based upon ample credit or the actual deposit of funds.

The decision below accepted as conclusive in its application to the facts here the principle of commercial law, that the possession of a properly indorsed bill of lading for a valuable consideration is not only evidence of a *jus in re*, but also of the right of property and possession until the holder's claims are satisfied. The court, however, notices that the bills of lading covering part of the beef and the garlic, and corresponding to one of the bills of exchange, were delivered to the claimants on April 6, but that the date on which the bills of lading for the balance of the beef passed into their possession is not shown; Judge Locke, nevertheless, being of opinion that since the latter bill passed at once into the hands of the neutral shippers and was by them transferred to the claimant, it made no difference, even if the transfer occurred while the property was *in transitu*, because it is only transfers of property *in transitu* made between enemies and neutrals that will not be recognized by prize courts.

We contend that the learned judge in this opinion ignored the underlying facts of the real ownership and interest which appear upon the face of the papers, or are deducible therefrom by necessary implication, and that he failed to recognize the important respects in which even a valid claim to property, based upon the transfer of a bill of lading and upon a banker's lien, is affected by the rules of prize law.

The general rules as to negotiability of bills of lading and the transfer of the title to the property covered thereby upon indorsement and delivery of the bill without delivery of the property and without formal assignment, follow in their development a transition similar to that by which the property in notes and bills of exchange became freely transferable by mere indorsement. (Abbott on Shipping, 5th Am. ed., † p. 529.) By mercantile law and usage a bill of lading stands as a substitute and symbolic representative of the goods described therein. (*Glyn* v. *East India Packet Co.*, L. R. 7 App., 591.)

But Mr. Justice Yates, in *Wright* v. *Campbell* (1 Black. Rep., 628), expresses a doubt "whether an assignment of a bill of lading made it negotiable in the same degree as a bill of exchange." Though bills of lading are spoken of as negotiable, this is only in a qualified and restricted sense, and they are more accurately said to be quasi negotiable instruments. Bills of lading are not negotiable in the full sense in which that term is applied to bills and notes. Nothing more is meant in applying the term to bills of lading than that the transfer of the bill passes to the transferee the transferrer's title to the goods described. But while a bill of lading is presumptive evidence of the ownership of the goods described therein, it may be explained or rebutted by other evidence showing where the real ownership lies.

Thus it is evident that the inquiry at the threshold is, What was the actual interest of the transferrer? Who was the real owner of the goods and entitled to dispose of them?

As to the banker's lien, the general rule is that where the consignor draws upon his consignee for the purchase money, and the draft with bill of lading attached is indorsed and transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the transferee, subject to be devested by the acceptance and payment of the draft; and if the consignee refuses to accept the draft, the title of the transferee becomes absolute.

Now, as to the nature of the security assumed to be given by the transfer of the bills of lading. It is perhaps a lien rather than a pledge, because, originally at least, a pledge passed the actual property as a bailment, and thus gave possession as well as the *jus in re* and implied a power of sale. But a power of sale also generally resides in the modern form of the pledge of choses in action under the term "collateral security." Except under statutory enactments by which the bill of lading is regarded strictly as a symbol of the goods and is placed on the same footing as a bill of exchange, the pledgee of a bill of lading has no more title in the goods than he would obtain if the goods themselves were delivered; that is, he gets only the title that the assignor has. The title by pledge is subject to be devested by the payment of the debt secured, and the pledgee has liabilities and duties cast upon him in consequence of the pledge as well as rights. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties.

In reference to these subjects, as in most other legal situations, there are certain presumptions and preposses-

sions, especially in favor of *bona fide* purchasers for value; but the real state of the case may be shown, and when shown is conclusive. A bill of lading, though *prima facie* evidence of property in the hands of a *bona fide* endorsee for valuable consideration, is capable of explanation to show the actual intent of the parties. These doctrines have been established in decisions from the early and leading case of *Lickbarrow* v. *Mason* (2 T. R., 73) to modern cases in the English courts like *Pease* v. *Gloahec* (L. R. 1 P. C., 219), and in the State courts, such as *Low* v. *De Wolf* (8 Pick., 101), *Rochester Bank* v. *Jones* (4 N. Y., 497), *Holmes* v. *German Security Bank* (87 Pa. St., 825), *Stollenwerck* v. *Thacher* (115 Mass., 224), and cases decided in this court—among others, *Conard* v. *Atlantic Insurance Co.* (1 Pet., 386), *Pollard* v. *Vinton* (105 U. S., 7), *Mo. Pac. R. R.* v. *McFadden* (154 U. S., 155). The latter cases considered the bill of lading in its aspect as a contract to transport rather than as a receipt for the goods, but approved the view that the "transfer does not preclude, as in cases of bills or notes, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense." (*Pollard* v. *Vinton*, *supra*.) "Indeed, the indorsement of a bill of lading was not considered to be properly an actual transfer in itself of the goods mentioned, but rather evidence, or an act raising a presumption of such a transfer; and consequently the object and legal effect of the indorsement might be ascertained by other circumstances."

(Abbott on Shipping, † p. 537; A. & E. Encyl. Law, vol. 18, p. 637.)

The bills here were drawn, the one to the order of the London and River Plate Bank by the shippers, and the other to the order of the shippers by the master, upon the bankers direct and not upon the consignee for discount by the bankers. It is to be noted that the tenor of the first bill contained an order to charge to the account of Pages as per advice, and of the second, to the account of Valenti as per advice, showing, we claim, the real interests and the necessity of full and satisfactory proof of the relations and occurrences which led to this transaction; and also showing that the different form and fate of these bills with their respective documents indicate some distinctive and separate incidents which ought to have been made plain, although they both show the enemy ownership.

The invoices sufficiently show Pages to be the consignee on his own account or Valenti's, and to a very limited extent on the shippers' account; from which it is evident that the consignor was a mere agent for purchase (*Potter* v. *Lansing*, 1 Johns., 215), and this is confirmed by the charge of a commission in the invoice; which brings us back to Pages and Valenti as the real owners or consignors.

The property, therefore, remained in the consignors who were personally liable to the bankers for the advances, but as to the goods, the attaching prize rights were paramount and overrode the lien or pledge. (*The Venus*, 8 Cr., 253, 275; *The Merrimack*, id., 317, 327, 328; *The Frances*, 8 Cr., 359; *The Frances*, 9 Cr., 183

The Mary and Susan, 1 Wheat., 25; *The St. José Indiano*, id., 208.) The real owners were, in effect, both consignors and consignees, and the result of this is that the neutral shippers and indorsers of the bill of lading had no real interest to transfer, and that their enemy principal's interest devolved upon the bankers subject to the risk of capture *jure belli*.

Now, it is true that mere shipment of goods does not always vest the property in the consignee though he be a purchaser. Bills for delivery to the shipper or order convey notice that although goods be shipped on account and risk of a consignee, and delivery to him be the object and intention of the shipment, there may yet be some unfulfilled condition on which the right to possession depends, inducing the shipper to retain the ultimate appointment of the consignment. But will it be doubted in this case that the agent in Havana of the real owner and shipper would have been duly appointed and received delivery if the shipment had arrived; or that the bankers, not showing beyond their own affirmation their actual and continuing interest and control, would have interposed a prohibition? If so, why did they retain the bill of lading for so large a portion of the cargo? Whether or not Pages had an independent interest in a part of the shipment, and was not merely the representative of Valenti—may not Valenti have received this retained bill of lading for the purpose of full instructions to his Havana correspondent concerning delivery of the merchandise? Was the bill "retained" by the claimants only in the sense that it was not forwarded to their

Havana agent, and not in the sense that it was not transmitted to Valenti at Barcelona for his complete disposal as owner? *Non constat* that if the goods had arrived at Havana the contract of purchase and delivery and the engagement with the bankers would not have been duly settled according to the true tenor of the transaction, apart from the proceeds of the goods, or that Pages would not have received immediate delivery as the intended consignee for all interests. The bankers' instructions to their Havana correspondents have not been disclosed. Therefore the assertion of the banker's lien is no answer to the captors in a court of prize; let the bankers look to their debtors.

Sometimes a bill is indorsed for the collection of the relative draft from the consignee, and sometimes for the acceptance of it only, and the authorities are conflicting on the point whether in case a draft is accepted by the consignee, and there is no further specific instruction from the consignor, the pledgee may surrender the bill to the consignee. (See Am. and Eng. Encyc. Law, vol. 18, p. 636, and cases cited.)

Here that situation does not exist, because the draft was upon the bankers, and was paid by them, and to fortify the claim that the goods were not actually to be delivered to the consignee until payment had been secured, the real state of the accounts between the bankers and the other parties should have been shown, since the circumstances necessarily imply dealings between them. There was no counter draft by the bankers upon the consignee, and the correspondence with their Havana agents, giving instructions as to collection, is not furnished but

is only indicated generally, and the statements are very far from asserting that the instruction was either to collect or to obtain security from the consignee.

After default on the obligation, which is not shown in the case at bar, the remedies of a pledgee are by suit on the debt and recourse to the securities pledged. (See Id., p. 678 *et seq.*, and cas. cit.) The debtor can not compel the creditor to resort to the collateral before suit. In this case, where new and sovereign rights had attached, it is claimed that the positive obligation rested on the creditor of bringing suit, and of pursuing the collateral only in case the suit failed.

Now, there is one duty resting upon a creditor ordinarily, and that is to demand payment of the maker of the obligation held, and on his refusal, to give due notice of the demand and refusal to the other parties liable on the face of the obligation, or known to the creditor to be liable in fact, where the circumstances are special. If the draft had been on the consignee and he had discounted it with the bankers, regular protest would, of course, need to be shown. The difference in this transaction suggests again, with increased emphasis, the query why the bankers were drawees unless the real parties had an independent credit with them or some contract which ought to have been disclosed. There is no evidence in the case that Valenti, who on the best showing of the claimant had *some* interest in the cargo, was ever notified that the bankers looked to him for payment. We repeat our contention that the case should bring forward proof that the bankers made some effort to notify

and hold those people whose bills upon themselves they had authorized and paid, or the principals in the background; just as much as, in the case of bills discounted on the acceptances of consignees, they would be required to show due demand, protest, and notice of default. The pledgee must use due diligence to enforce payment, and we maintain in the case at bar the diligence should have been shown by suit or some equivalent proceeding against those personally liable. Wanting that, and as against the claim in prize, the assertion of neutral title by indorsement of the bill of lading must fail of success. Though entitled to but one satisfaction of his debt, a creditor may get judgment and issue execution on the debt as well as enforce a negotiable security. Here, while he has received the amount of the insurers' underwritings and may be pursuing his other remedies in the foreign jurisdictions, he is asserting the remedy by lien which prize rights especially override and extinguish.

Hence, allowing full just effect to the rules respecting transfer of title by indorsement of bills of lading and respecting pledges, the inquiry reaches down to the real facts of the case, and they have not been satisfactorily shown. There is nothing but the formal statement that the bankers have not been indemnified. They say they have collected insurance; they do not state how much, nor whether upon a contract constituting a war risk. If the insurers are really interested, why do not they make their claim or support the claimant's demand? The first liability is that of Valenti and Pages, and the goods are properly answerable (if at all) when it is shown that they can not respond, or that the claimants can not

hold them upon legal proceedings. Certainly against the proper vested rights of captors some testimony upon these points should have been adduced.

If to the foregoing suggestions the reply is made that the argument for the Government rests upon hypothetical facts and upon authorities in which circumstances showing a defective claim or weighing against the *bona fides* of the purchaser were not assumed but established, the answer is that in prize law the *onus probandi*, especially of a neutral interest, rests upon the claimant, and that a bare attestation by an agent of the most formal and meager facts, omitting all the antecedent and consequent transactions of the parties, amounts to that *astutia* to conceal or obscure the truth which merited and received Lord Stowell's condemnation in the case of the *Rosalie and Betty*, *supra*.

C.—*The neutral claim of title made here as affected by prize law.*

But we maintain that even if the title to the goods in the neutral bankers was more satisfactorily shown by the testimony and fully approved by the doctrines of commercial law, they can not be allowed here, because the well-established rule of prize court decisions is that a lien of this nature must yield to the sovereign claim of the belligerent and the vested rights of captors. It is true that decisions of the courts, under special circumstances, support the view that in such a case the captor takes *cum onere*, but this seems to be where the neutral is in possession of the actual goods with a right of retention until a certain amount is paid to him, and not where he has a

mere *jus in re* which he can not enforce without the aid of a court of justice, and the view is expressed that in order to make a fair uniform rule, it ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest; and it is pointed out that otherwise when such title is held by an enemy in trust for the neutral, the latter would lose his property, but when it is in a neutral in trust for an enemy, the property would be restored, not for the neutral's benefit, but merely as a conduit through which to convey it to the enemy. (*The Amy Warwick*, 2 Spr., 150.) This decision cites *The Frances* (8 Cr., 418), *The Tobago* (5 Rob., 218), and *The Marianna* (6 Rob., 24), in which the neutral claims of this nature were not favored; and also certain English authorities appearing to hold the contrary, but they were cases in which British prize courts allowed to British merchants the amounts of their claims upon enemies' ship for repairs and supplies.

The Lynchburg (Blatchf. Pr. Cas., 49), decided that in prize law a bill of lading transmitted to a party to cover his advances on cargoes shipped does not pass the title to the cargo. The claimants in that case were loyal citizens who had made an advance to neutral merchants for the purchase of certain coffee, and who drew drafts on the express condition that the claimants should hold the coffee until their advances were reimbursed; and so far the court ordered restitution. But as to the balance of the claim, resting upon shipment under a bill of lading indorsed to the claimants, the court said:

> The claim to an absolute ownership * * * was placed before the court * * * upon the

> proposition of law that a bill of lading, transmitted * * * by the shipper to cover advances, passed * * * the title to the cargo purchased therewith. *If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt*, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. [Citing *The Frances, The Tobago, The Marianna, supra.*] *Here the vessel* [*was an*] *enemy's bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port*, and, on the surrender of the principal portion of the consignment to the claimants, *no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading.*

In that case, although the claimants were loyal citizens, the doctrine was applied and the fact fully recognized that such a claim must be established by other evidence than a mere statement of ownership or of hypothecation.

The case of *The Frances* (8 Cr., 418) and the English cases are sufficiently discussed in the main brief for the Government and the captors.

In the cases discussed by Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, at pages 66 and 67, the questions involved refer to the devestment of title *in transitu* or to invoice evidence that the shipment was for the account of the claimants and that the goods were purchased in pursuance of the orders of the claimants, and do not refer to such an aspect of the transfer of title by indorsement and delivery of bills of lading

as is presented in the case at bar. The learned justice, on page 68, referring to the cases of the *St. Jose Indiano* (2 Gall., 268; 1 Wheat., 208) and *The Mary and Susan* (1 Wheat., 25)—see main brief for Government and captors for exhaustive reference to the latter case—says that when an agent abroad makes purchases of goods in pursuance of orders for a principal, ordinarily he devests himself of title, although he may sell his own goods or purchase the goods on his own credit, and the proprietary interest vests in the principal immediately on such purchase if the agent parts with possession by an actual and unconditional delivery for the use of his principal. "Such delivery or appropriation * * * need not be by a direct act, but it may constructively arise from the circumstances of the case *even where the shipper has made an immediate assignment of the goods.* In all these cases the material question is, whether the shipper retains or possesses any control over the property (independent of the mere right of stoppage *in transitu* in cases of insolvency), or has parted with possession and all authority over it."

We contend, in the light of these principles, and since there is no convincing proof of a neutral title here, that notwithstanding the immediate assignment by the shipper upon his indorsement of the bill of lading, he had fully parted with possession and authority in behalf of the enemy shippers and consignee, whose interest clearly appeared from the invoices.

The broadest neutral right which can be maintained is where more than a *prima facie* title is shown, where the neutral interest is proved by complete and convincing

evidence to be a reality and to be *bona fide*, and in such a case it may be that in the balance of rights between a neutral claimant and captors, the captors' claim would be required to yield. Otherwise the belligerent rights outweigh and override the neutral claim, which is then presumed to be serving as a mere cover to an enemy interest, and is regarded merely as a debt, the collection of which must be sought by the claimant through ordinary legal proceedings in the appropriate jurisdiction against his principal and debtor.

There is another indication in this record besides those heretofore pointed out of the real ownership in connection with the vessel's entire voyage. There was no charter party, which is a very usual and proper document for a vessel to carry, especially on a long voyage. The last voyage began at Barcelona, where the enemy vessel owner, Valenti, resided. (Rec., p. 8.) It sailed some time prior to March, 1898, for Montevideo, with a cargo of wine and salt, took on the jerked beef and garlic at Montevideo, and then was proceeding for Havana when captured. It is most likely that the vessel did not have a charter party for two reasons: In the first place, a charter party is a very revealing document as to the transactions which the vessel is pursuing; in the second place, a vessel would be much less likely to carry a charter party when the commercial venture is her owner's; and therefore we claim that it quite clearly appears from the record that the entire voyage was on Valenti's account, and substantially the whole interest in both cargoes belonged to him. At least, as we have above pointed out, the invoices show his interest in the

cargo before the court, both separately and in connection with Pages, the consignee at Havana, who was quite clearly a correspondent and the Cuban agent of the mercantile adventure formed in conjunction with the London bankers, or on credits arranged with them, to carry a profitable food cargo for the Spanish Government market at Havana.

D.—*Provisions as contraband when destined for a besieged stronghold of the enemy.*

Provisions have been contraband of war at various periods, and are so regarded by the consensus of more recent authorities when destined for military use. The question whether they are generally contraband is by no means settled. It depends on the attitude of the belligerent himself, as shown by his proclamations, on the view which is adopted in the particular country, and on various circumstances in the situation of the parties to the war. Late events show that even now a leading power of the world is by no means ready to admit or concede that provisions are not contraband generally.

In *The Commercen* (1 Wheat., 382) the cargo was barley and oats, the property of British subjects. Justice Story said that by the modern law of nations provisions are not generally deemed contraband, but may become so, although belonging to a neutral, on account of the particular situation of the war or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or his ports of naval or military equipment.

In *The Peterhoff* (5 Wall., 28) the goods consisted of cases of harness, army boots, blankets, and similar articles, also an assortment of drugs; and the rule was laid down by Chief Justice Chase that besides the class of articles ordinarily intended for military purposes there was a class of articles which may be and are used for purposes of war or peace, according to circumstances; that merchandise of this class is contraband only when actually destined for the military or the naval use of the belligerent, whether the port for which it clears is blockaded or not, while merchandise consisting of articles exclusively used for peaceful purposes is not contraband at all, although liable to seizure and condemnation for violation of blockade or siege.

In the case of *Maisonnaire* v. *Keating* (2 Gall., 325) a cargo of provisions was held contraband, the language of the court being:

> Admitting that provisions are not in general contraband of war, it is clear that they become so when destined to a port of naval equipment of an enemy, and *a fortiori* when destined for the supply of his army.

See also Parsons' Marit. Law, vol. 2, pp. 93, 94; 1 Kent, 140, where the learned chancellor says that goods not generally contraband may become so "under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it," the important distinction being whether the articles are intended for ordinary use or going with a highly probable destination to military use; *The Peterhoff* (Blatchf. Pr. Cas., 463), quoting from Moseley on Contraband of War, and citing

the works of Halleck and Phillimore on International Law.

These authorities are in accord with decisions of Sir William Scott.

The Jonge Margaretha (1 Rob., 189) was a case of a cargo of cheese condemned as contraband on the ground that it was destined for a port of naval equipment. The learned judge expresses the view that if the great predominant character of a port be that of a port of naval military equipment, the articles ought properly to be condemned, although merchant ships resort to the same place and although it is possible that the articles might have been applied to civil consumption.

In *The Edward* (4 Rob., 68) wines going from Bordeaux to Brest were condemned, the port of destination containing a large armament much in need of such provision, the character of the vessel being held to be that of a French victualer carrying *munitions de bouche*.

The *Frau Margaretha* (6 Rob., 92) was distinguished from the *Jonge Margaretha*, the cargo of the former also consisting of cheese, because the destination was not to Brest, the naval arsenal of the enemy, but to Quimper, a point near, but not to be regarded as an identical destination. The decision was that the articles were not so clearly contraband, "though certainly very near it," as to preclude claimant from giving further proof.

(See also the *Zelden Rust*, 6 Rob., 93, and *The Ranger*, id., 125.)

Now, Havana was the seat from time immemorial of Spanish sovereignty in Cuba; it was the headquarters

of the civil, military, and naval service of the island; it contained, especially in anticipation of a war which all the world and particularly all Americans and Spaniards regarded as inevitable from early in the year 1898, the garrisons, camps, hospitals, arsenals, shipyards, and the civil establishments tributary to the Spanish Government, with an increasing concentration of troops from the peninsula, and of the volunteers (the native branch of the Spanish service, similar to militia) from the surrounding country. The concentration and accumulation of provisions at Havana, then, was a necessary part of the Spanish military operations, and Spaniards in the commercial service of their country were fully apprised of that fact. It was known that such food accumulation was especially necessary, because Havana was sure to be the chief point of blockade and siege, as it was as soon as war resulted. Further, the provisions in this case, jerked beef and garlic, were especially appropriate to military use as important components of Spanish army rations. Consequently the military destination of the cargo shipped in a Spanish vessel owned and manned by Spaniards, and the enemy ownership, which not only was not disproved, but evidently appeared, make the goods valid prize under the "particular situation of the war" or "the condition of the parties engaged in it," or "on account of their destination" (*The Commerce*n, *supra;* 1 Kent, 140), irrespective of the neutral claim and irrespective of the fact that the voyage began some time before war was actually declared and before Havana was placed under a state of blockade. If these features have any bearing upon the

case under the circumstances, it must fairly be presumed that the enemy shipper sent forward the cargo with full anticipation of the actual hostilities which followed.

A neutral claim must come before a belligerent prize court, enforcing the belligerent's just rights, with such clear and full proof that the jealousy and suspicion, with which Lord Stowell thinks prize tribunals must look upon neutral claimants connected with the enemy's trade, necessarily disappear. This neutral claim being a mere cover finds nothing in the sailing before the actual declaration of war to sustain it. The property was enemy property found upon the high seas during the hostilities, and the enemy owner must necessarily suffer this loss as well as the loss of his vessel.

We therefore respectfully submit to the court that on this record and the legal doctrines applicable to it there was no valid transfer of title in this enemy property to the claimants. They may well enough be left to seek the payment of the debt due them from those who owe it as a personal obligation; the insurers, if neutrals (and the neutrality of the insurers is not even alleged), may justly be assumed to have taken a war risk and to have received the large premiums paid for such a risk; and the merchandise, being food supplies of a peculiarly valuable nature to the Spanish forces, destined for the seat of their government in Cuba, where food stores for the Government officers and forces, civil and military, would need to be accumulated—all of which was perfectly patent long before the war and beyond doubt to a Spanish vessel

owner and trader—was clearly contraband of war; and therefore a decree of condemnation should have been entered below. If the small portion of the merchandise shown by the invoice on page 41 ever belonged to the Argentine shippers, Pla, Gibernau & Co., or still belongs to them, they have made no claim, and more than a year and a day have elapsed since the institution of the prize proceedings, and therefore this portion of the property should be deemed to be abandoned and be condemned to the captors for contumacy and default of the supposed owner. (*The Harrison*, 1 Wheat., 298.)

We therefore respectfully ask that the decree below be reversed and a decree be entered condemning the property to the United States.

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